A

ASIA GENERAL EQUIPMENT AND SUPPLIES SDN BHD & ORS

v.

B

MOHD SARI DATUK OKK HJ NUAR & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
CHEW SOO HO J
[SUIT NO: K-22-197-1997]
21 OCTOBER 2013

C ***COMPANY LAW:*** *Shares - Mortgage - Transfer of shares in consideration for loan - Plaintiff's right to redeem shares upon repayment of loan - Wrongful foreclosure of plaintiff's shares - Share capital increased in breach of loan agreement - Claim for redemption of shares - Whether "the said shares" meant mortgaged ordinary shares or increased*
D *share capital*

CONTRACT: *Loan - Transfer of shares - Plaintiff's right to redeem shares upon repayment of loan - Wrongful foreclosure of plaintiff's shares - Share capital increased in breach of loan agreement - Claim for*
E *redemption of shares - Whether "the said shares" meant mortgaged ordinary shares or increased share capital*

CIVIL PROCEDURE: *Judgments and orders - High Court - Judgment of High Court as affirmed by Federal Court - Meaning of "the*
F *said shares" - Whether mortgaged ordinary shares or increased share capital - Whether there was any ambiguity - Whether inherent jurisdiction of court had to be exercised - Rules of Court 2012, O. 92 r. 4*

The plaintiffs were shareholders in Multi Industries (Sabah) Sdn Bhd ('the company'). On 9 February 1983, the plaintiffs, the
G company and the first defendant entered into a loan agreement ('agreement') where the first defendant agreed to loan the company a sum of RM3 million for a period of five years. In consideration, the plaintiffs agreed to transfer their 2,739,500 ordinary shares of the company to the first defendant. The
H second, third and fourth defendants were the nominees of the first defendant and were entitled to all dividends and benefits as registered shareholders of the company. It was agreed that a re-transfer would take effect upon the expiry of the loan period and the first defendant *vide* cl. 13 of the agreement agreed, among
I others, not to procure the increase or decrease in the issued share capital of the company. The company undertook to repay the loan on demand upon expiry of the loan period. Although no demand

was made to the plaintiffs, the first defendant foreclosed all of the shareholdings pledged by the plaintiffs. The plaintiffs contended that the purported foreclosure was a clog on the equity of redemption and that the first to fourth defendants were trustees for the plaintiffs. By a resolution dated 18 November 1997, the first defendant and his nominees increased the share capital of the company to RM16,850,000 and allotted 14,000,000 ordinary shares to their nominee, the fifth defendant, which was in breach of cl. 13 of the agreement. Hence, the plaintiffs sued and sought, *inter alia*, (i) a declaration that the alleged foreclosure was null and void and of no effect; (ii) redemption of the mortgage of the said shares by the transfers of the said shares back to the plaintiffs by the second and third defendants or redemption of the said shares upon repayment by the company of the said loan; and (iii) a declaration that the first to fifth defendants held the said shares upon trust for the plaintiffs. The High Court allowed the plaintiffs' claim. Subsequently, the Court of Appeal allowed the first to fifth defendants' appeal. The Federal Court, however, had set aside the order of the Court of Appeal and restored the judgment of the High Court ('the judgments'). The third to fifth defendants ('the defendants') sought *vide* encl. 26 pursuant to the inherent powers of the High Court under O. 92 r. 4 of the Rules of Court 2012 ('ROC') for a declaration that "the said shares" as stated in the judgments meant the mortgaged 2,739,500 ordinary shares in the company. In other words, "the said shares" did not mean or include the increased share capital and the 14,000,000 ordinary shares allotted to the fifth defendant.

Held (dismissing application in encl. 26):

(1) The defendants did not complain of any injustice or abuse of the process of the court but on the workability of the order or judgment of the High Court read together with the judgment of the Federal Court. In the circumstances, O. 92 r. 4 of the ROC was not the appropriate provision as there was no question of injustice or an abuse of the process of the court for this provision to be invoked. In the event of any ambiguity or dispute as to the High Court judgment, the court's inherent jurisdiction could be invoked to review or clarify the same before the sealing of the judgment. If it was after the sealing of the judgment, the avenue was to appeal to the higher courts. The first to fifth defendants had appealed to the Court of Appeal and succeeded but the

Federal Court had allowed the final appeal by the plaintiffs. Hence, the filing of an interlocutory notice of application at this stage was an inappropriate process. If there was an ambiguity, it ought to have been raised and resolved in the respective appeals. (para 9)

(2) The court was *functus officio* and had no jurisdiction to belatedly entertain the application or grant declarations to the defendants in light of the final appeal having been decided by the Federal Court which had finally disposed of the cause of action. When the cause of action had been extinguished, there was no further application by way of notice of application to seek declarations relating to the judgments which have been perfected. The seeking of declarations on reference of "the said shares" in the said judgments was an attempt to reopen or re-litigate issues in the same cause of action. (paras 10 & 11)

(3) The issue of the plaintiffs' mortgaged shares was a material issue in the plaintiffs' case. The defendants could not have omitted it and only now raise it when this was the issue which could have been brought forward for litigation. It was too late for the defendants as issue estoppel would estop the defendants from reopening and re-litigating such issues which ought to have been raised in the trial. In the circumstances, this court could not allow such issues to be raised for re-litigation. (para 12)

(4) The defendants were holding the said shares upon trust for the plaintiffs, therefore, "the said shares" must be referring to the shares as a consequence of the increased share capital which the defendants were holding on trust. The trial judge had expressed unequivocally that "the said shares" referred to the 14,000,000 ordinary shares and the Federal Court, in affirming the decision and judgment of the High Court, could not have reverted the 14,000,000 ordinary shares to the initial 2,739,500 shares. In light of this, there was no ambiguity which required inherent jurisdiction of the court to be exercised to correct or rectify. Thus, there was no basis for prayer in encl. 26 as there was no injustice nor an abuse of the process of the court for this court to invoke its inherent powers under O. 92 r. 4 of the ROC 2012. (paras 13-16)

Case(s) referred to:
Abdul Rashid Maidin & Ors v. Lian Mong Yee [2008] 1 CLJ 1 CA ***(refd)***
Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Chemfert Sdn Bhd & Anor v. Lim Hua [2010] 7 CLJ 491 CA ***(refd)***
Lim Lek Yan v. Yayasan Melaka [2013] 1 CLJ 1081 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 92 r. 4

For the plaintiffs - PK Lim; M/s PK Lim & Co, Advocs
For the defendants - David Fung; M/s Alex Pang & Co, Advocs

Reported by Sandra Gabriel

JUDGMENT

Chew Soo Ho J:

Introduction

[1] Enclosure 26 in a notice of application filed by the third to the fifth defendant (collectively known as "the defendants") pursuant to the inherent powers of the High Court under O. 92 r. 4 of the Rules of Court 2012.

[2] The orders prayed for by the defendants are:

(i) a declaration that the wording of "the said shares" stated in para. 2 and 7 of the High Court judgment dated 6 June 2008 read together with the Federal Court's written grounds of judgment dated 25 July 2011 means the mortgaged shares of 2,739,500 ordinary shares in Multi Industries (Sabah) Sdn Bhd;

(ii) a declaration that the enforcement of para. 4 and 5 of the High Court judgment dated 6 June 2008 cannot be done without prejudice to the fifth defendant and against Multi Industries (Sabah) Sdn Bhd's articles of association and the Companies Act, 1965;

(iii) costs, and

(iv) such further relief that this honourable court deems fit and just to grant.

A **Background Facts**

[3] The plaintiffs were shareholders in Multi Industries (Sabah) Sdn Bhd ("the company").

B **[4]** On 9 February 1983, the plaintiffs, the company and the first defendant had entered into a loan agreement in which the first defendant agreed to lend the company a sum of RM3 million for a period of five years commencing from 1 January 1983 to be disbursed in 60 monthly instalments of RM50,000 each which ended on 31 December 1987. In consideration of this interest-free C loan, the plaintiffs agreed to transfer their shares amounting to 2,739,500 ordinary shares of the company and its management to the first defendant. First defendant had also executed re-transfer forms of the said shares back to the plaintiff which were kept for safe keeping by a legal firm. It was agreed that the re-transfers D would take effect upon the expiry of the loan period on 31 December 1987.

[5] The second, third and fourth defendant were the nominees of the first defendant. During the period of the said loan, the first E defendant and his nominees defendants were entitled to all dividends and benefits as registered shareholders of the company. First defendant *vide* cl. 13 of the aforesaid agreement had agreed not to transfer, assign, dispose or otherwise encumber the plaintiffs' shares and not to procure the increase or decrease in F the issued share capital of the company.

[6] The company undertook to repay the loan on demand upon expiry of the loan period. No demand was, however, made to the plaintiffs by the first defendant to repay the loan. By a letter dated G 13 July 1995 to the plaintiffs, first defendant asserted that he caused to foreclose all of the shareholdings pledged by the plaintiffs to him for alleged failure to repay the loan. Plaintiffs nevertheless contended that the purported foreclosure was a clog on the equity of redemption and is null and void and of no effect; H alternatively, plaintiffs contended that the foreclosure constituted conversion by the first defendant and his nominees defendants of the said shares to their own use thereby wrongfully depriving the plaintiffs of the same resulting in plaintiffs having suffered loss and damage. Plaintiffs averred that the first to fourth defendant were I trustees for the plaintiffs. By a resolution dated 18 November 1997, first defendant and his nominees defendants had increased

the share capital of the company to RM16,850,000 and allotted 14,000,000 ordinary shares to their nominee, the fifth defendant, in breach of cl. 13 of the aforesaid agreement. Hence, the plaintiffs sued and sought, *inter alia*, a declaration that the alleged foreclosure was null and void and of no effect, redemption of the mortgage of the said shares by the transfers of the said shares back to the plaintiffs by the second and third defendant or redemption of the said shares upon repayment by the company of the said loan, a declaration that the first to fifth defendant held the said shares upon trust for the plaintiffs, injunction and other consequential orders and costs. After a full trial, the High Court had allowed the plaintiffs claim on 6 June 2008. However, upon the first to fifth defendants' appeal, the Court of Appeal had on 6 April 2010 allowed their appeal. Upon further appeal to the Federal Court by the plaintiffs against the decision of the Court of Appeal, the Federal Court had on 25 November 2011 set aside the order of the Court of Appeal and restored the judgment of the High Court.

[7] The defendants now seek declaration that "the said shares" as stated in the High Court judgment dated 6 June 2008 and the Federal Court judgment dated 25 July 2011 means the mortgaged 2,739,500 ordinary shares in the company. In other words, "the said shares" does not mean or include the increased share capital and the 14,000,000 ordinary shares allotted to the fifth defendant.

Findings Of Court

[8] All submissions and affidavit evidence have been duly considered by this court. Enclosure 26 filed herein by the third, fourth and fifth defendants ('the defendants') is pursuant to O. 92 r. 4 of the Rules of Court 2012 on "the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court".

[9] From the facts of this case *vide* the affidavit evidence of both parties herein, I find it as a fact that the defendants did not complain of any injustice or abuse of the process of the court but on the workability of the order or judgment of the High Court dated 6 June 2008 read with judgment of the Federal Court dated 25 November 2011 which affirmed the said High Court judgment presumably or allegedly "ambiguous" or "uncertain" as to "the said shares" as envisaged or stated in the said judgments of the High Court and the Federal Court. In the circumstances, O. 92 r. 4 of the Rules of Court does not seem to be and is not the

appropriate provision for simple reason that there is no question of injustice or an abuse of the process of the court for this provision to be invoked. Indeed if there is, I am certain that the Court of Appeal and the Federal Court hearing the respective appeals of this case would have identified it but no such issue was raised at all which can only mean that there is no injustice nor any abuse of the process of the court. I am inclined to agree with the plaintiffs' submission that in the event of any ambiguity or dispute as to the High Court judgment, the court's inherent jurisdiction can be invoked to review or clarify the same before the sealing of the judgment or that before it was perfected and if it was after the sealing of the judgment, the avenue is to appeal to the higher courts citing *Lim Lek Yan v. Yayasan Melaka* [2013] 1 CLJ 1081 at 1082, 1093, 1094. The first to fifth defendant had appealed to the Court of Appeal and succeeded but the Federal Court had allowed the final appeal by the plaintiffs. Hence, the filing of an interlocutory notice of application at this stage is to this court an inappropriate process after the judgment of the High Court had been sealed or perfected and that appeal had been exhausted with the Federal Court affirming the judgment of the High Court. If there is an ambiguity, it ought to have been raised and resolved in the respective appeals. The fact that no issue was taken even at the appeal to the Federal Court could only mean that there was and is no ambiguity.

[10] On account of the above fact, I agree with the plaintiffs that this court is *functus officio* and has no jurisdiction to belatedly entertain this application or grant declarations thereof to the defendants in the light of the final appeal having been decided by the Federal Court which had finally disposed of the cause of action; when the cause of action had been extinguished, there is no further application by way of notice of application to seek declarations relating to the judgments which have been perfected. The cited cases by learned counsel for the plaintiffs namely *Abdul Rashid Maidin & Ors v. Lian Mong Yee* [2008] 1 CLJ 1 CA *inter alia* is relevant.

[11] By seeking declarations from this court on the reference of "the said shares" in the said judgments of the High Court and the Federal Court which is a substantive issue in the said cause of action after the whole case had been duly determined and decided till the Federal Court on matters or issues which had been finally extinguished leading to the said judgments, to this court, is indirectly to attempt to reopen or re-litigate issue in the same

cause of action. I find that the defendants are estopped by the doctrine of *res judicata* on issue estoppel being one of the two kinds of estoppel *per rem judicatum* along with estoppel relating to cause of action; see the salutary case on *res judicata* in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 SC. The Court of Appeal in *Chemfert Sdn Bhd & Anor v. Lim Hua* [2010] 7 CLJ 491 which has succinctly summarised the said doctrine as enunciated in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* (*supr*a), had echoed and held in respect of issue estoppel as follows:

> (3) Issue estoppel also applies to issues which might have been and "which was not brought forward, either deliberately or due to negligence or inadvertence, though not actually decided by the court. *Res judicata* is therefore not confined to the issues which the Court is actually asked to decide, but covers issue or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them …

[12] The issue of the shares mortgaged is in fact the subject matter of the case which had been decided. Although the initial pleadings of the plaintiffs stated the ordinary shares of the company of the plaintiffs mortgaged to the first defendant were 2,739,500 shares, plaintiffs had nevertheless amended their pleadings without the objection from the defendants on 6 November 1997 and 21 January 2000 when plaintiffs joined the fourth and fifth defendant respectively as parties herein that the defendants held the said shares upon trust for the plaintiffs. The issue of the plaintiffs' mortgaged shares was a material and perhaps one of the most essential issue in the plaintiffs' case. Defendants could not have omitted it and only now raise it when this was the issue which could have been brought forward for litigation. It is indeed now too late for the defendants as issue estoppel would estop defendants from reopening and re-litigating such issue which ought to have been raised in the trial. In the circumstances, this court cannot allow such issue to be raised for re-litigation. The maxim *res judicata pro veritate accipitur* ie, when a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties who should

accept it as the truth; and interest *rei publicae ut sit finis litium* ie, the public policy of the law is that it is in the public interest that there should be finality in litigation can be appropriately invoked and applied in the instant case.

[13] Is the wording "the said shares" in the High Court judgment dated 6 June 2008 and the Federal Court judgment dated 25 July 2011 meant only the mortgaged shares of 2,739,500 ordinary shares in the company as contended by the defendants? From the plaintiffs' pleadings as amended, it was included that the defendants were holding the said shares upon trust for the plaintiffs which I agree with the plaintiffs' submission that "the said shares" must necessarily be referring to the shares as a consequence of the increased share capital which defendants were holding on trust. I find support from the judgment dated 6 June 2008 (exh. "YPL-1" annexed to the affidavit in opposition of the plaintiffs) where the learned trial judge said at pp. 5 and 6:

> The Plaintiffs say that the Defendants are trustees and/or agents of the Plaintiffs in respect of such receipts and expenditures, and are therefore liable to account to the Plaintiffs of such receipts and expenditure. The 1st Defendant and his nominees, the 2nd, 3rd and 4th Defendants, by a resolution dated 18th November 1997 increased the share capital of the Company to RM16,850,000.00 and allotted 14,000,000 ordinary shares (hereinafter referred to as "the said Shares") to their nominees, the 5th Defendant.
>
> Such increment in capital and allotment of shares are in breach of Clause 13 of the said Agreement and the Plaintiffs say such shares are held by the 5th Defendant in trust for the Plaintiffs.

[14] From the reference in the judgment recapitulated above, it is explicit that the term "the said shares" refers to in the judgment is referring to the 14,000,000 ordinary shares upon an increase in the share capital of the company; it does not refer to the initial shares of 2,739,500 ordinary shares which would presumably have been replaced by the new ordinary shares *vide* the share capital increase. I find that the learned trial judge has expressed unequivocally that "the said shares" refers to the 14,000,000 ordinary shares. Consequently, when the Federal Court in affirming the decision and judgment of the High Court could not have reverted the 14,000,000 ordinary shares to the initial 2,739,500 shares; otherwise, the Federal Court would have so expressed it. In light of this, I do not find any ambiguity which requires inherent jurisdiction of the court to be exercised to correct or rectify.

[15] It follows upon the above finding that there is no basis for prayer (ii) declaration in encl. 26.

[16] For the foregoing reasons, I hold that there is no injustice nor an abuse of the process of the court for this court to invoke its inherent powers under O. 92 r. 4 Rules of Court 2012 to do justice to this case nor do I find merit in this application. I therefore dismiss this application with costs of RM8,000.